No. 99-936

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR *WRIT OF CERTIORARI*

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Petitioners Crystal Ferguson, *et al.*, respectfully submit the following reply brief in support of the petition for certiorari.

Introduction

Contrary to Respondents' characterization in their Brief in Opposition ("Opp. Br."), this case is not about whether pregnant women should use cocaine or any other substance that may be harmful to themselves or their fetuses. Nor is this case about the legitimacy of different medical approaches to this problem. Rather, as the dissenting opinion below clearly recognized, this case is about the limits that the Fourth Amendment puts on state actors who conduct searches to further their traditional law enforcement objectives -- collecting evidence to be used for the arrest and prosecution of people suspected of breaking the law -- when those traditional functions are carried out in conjunction with other non-law enforcement purposes.

Respondents ignore this threshold legal question, though, arguing instead that under this Court's "special needs" jurisprudence, despite the dominant law enforcement purpose present in the Policy, the search at issue was "reasonable" under the Fourth Amendment. By reducing this case to a factual dispute over reasonableness, Respondents hope to distract the Court from the important and well-defined legal issue presented by this case: when are law enforcement purposes so dominant that a search with a concomitant public policy purpose falls within the normal Fourth Amendment requirements of a warrant and probable cause and not within the "special needs" exception.

Respondents also attempt to obfuscate this clear legal issue by arguing that the ruling of the court of appeals is sustainable under two alternate independent grounds, namely that Petitioners consented to the searches and/or that the Medical University of South Carolina ("MUSC") staff were not state actors. These arguments, unsupported by the facts and the case law, are mere red herrings. Neither is an adequate ground for declining to address the important constitutional questions raised by this Petition.

Argument

I. Respondents' Fact-Based Argument Diverts This Court From the Threshold Legal Question, Virtually Ignored by the Fourth Circuit, of Whether the Search Conducted Here Was "Beyond the Normal Need for Law Enforcement."

As Respondents point out, this Court has never stated, in the context of the "special needs" exception to the Fourth Amendment's requirements of a warrant supported by probable cause, that "the 'special need' must be to the exclusion of normal law enforcement goals." Opp. Br. at 20. However, as Respondents have ignored throughout their brief, this Court has twice acknowledged that it is an open federal question as to how much law enforcement involvement is too much.

First, in *New Jersey v. T.L.O.*, a case in which the search policy was not formulated for law enforcement purposes,[1] this Court wrote that "[t]his case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question." *T.L.O.*, 469 U.S. 325, 341 n.7 (1985).

This Court once again acknowledged the presence of this important legal issue in *Skinner v. Railway Labor Executives' Association* when it wrote that "[w]e leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program." *Skinner*, 489 U.S. 602, 621 n.5 (1989).

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[1] Respondents' claim that *T.L.O.* decides the question presented by Petitioners borders on the disingenuous. *See* Opp. Br. at 20. In *T.L.O.*, the policy was designed by the school *alone*, and evidence was passed along to law enforcement as a mere afterthought. In this case, the Policy itself was *designed* by and for law enforcement, and positive search results were routinely forwarded to law enforcement pursuant to the Policy itself.

Clearly, then, Respondents are wrong when they claim that "the principles and parameters of the special needs doctrine are clearly established by Supreme Court precedent," Opp. Br. at 11, and that this Court "has clearly enunciated the guiding principles and parameters of the special needs doctrine." Opp. Br. at 16. Instead, the open question, as detailed more fully in the Petition, is an important constitutional question requiring this Court's guidance, a question that directly governs the outcome of this case.

Respondents are also wrong when they claim that Petitioners argue that a "special needs search must be *totally* divorced from any law enforcement activity." Opp. Br. at 20 (emphasis added). Nowhere in the Petition is such a claim made. In fact, Petitioners' argument is limited to searches conducted "primarily" for law enforcement purposes. *See* Pet. at 11. Such a search is exactly what occurred here.

Respondents themselves admit that their Policy was developed for law enforcement purposes. At first, in 1989, Respondents started using what they referred to as their "*voluntary* referral protocol." Opp. Br. at 4 (emphasis added). Pursuant to this protocol, certain pregnant women were tested for drugs. Women who tested positive were not reported to the police. Respondents claim that instead, they were referred for treatment. *Id.* According to Respondents, when that protocol failed, they turned instead to an *involuntary* protocol, the Search Policy challenged here by Petitioners, consisting of arrest and prosecution. *Id.* at 4-5. This new protocol was based on "publicity about a policy being implemented in the upstate."[2] *Id.* at 5. In Respondents' own words, MUSC's second protocol "paralleled the prior protocol" except that it added one thing -- the "threat of law enforcement intervention."[3] *Id.* at 5. Even Respondents' version of events,

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[2] The policy Respondents refer to so obliquely is the policy of arrest and prosecution that was implemented by "our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs," and described by MUSC General Counsel Joseph Good. PX 2 (App. 67); *see also* Pet. at 3.

[3] The existence of this dominant law enforcement purpose belies Respondents' claim that the key legal focus in this case should be the special non-adversarial relationship between "healthcare providers and

then, establishes that the key component of the policy, the component that Respondents claim proved to be the "pivotal factor in making this an effective policy," *see* Opp. Br. at 7, was the law enforcement involvement. This case, with such a dominant law enforcement purpose, even if combined with a non-law enforcement purpose, poses the important threshold question raised by Petitioners.

Respondents also fail to refute the evidence of a dominant law enforcement purpose cited in the Petition. Without repeating the detail included in the Petition, we reiterate here only the most important pieces of evidence: Solicitor Condon's letter describing the task force's purpose as "to consider possible prosecution of the mothers of drug affected babies"; the fact that the Search Policy was first memorialized by law enforcement personnel; Mr. Good's letter admitting that the policy was developed "at the suggestion of law enforcement and the solicitor's office," and the requirement that MUSC personnel maintain an evidentiary chain of custody. *See* Pet. at 3-4. These pieces of evidence support the conclusion gleaned from Respondents' own history of the policy: that the policy's dominant purpose was law enforcement.[4]

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patients." Opp. Br. at 18. A policy whose "pivotal factor" was the "threat of law enforcement intervention" cannot reasonably be regarded non-adversarial.

[4] Respondents' reliance on cases in which there is no comparable level of law enforcement involvement to argue that the "special needs" exception should apply to the searches at issue here is also a distraction from the central issue presented in this case. For example, Respondents ignore that *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993), was not a special needs case; rather, *Wildauer* relied on the line of "administrative search" cases. *See Wildauer*, 993 F.2d at 372. Furthermore, the Fourth Circuit differentiated the "home visits by social workers" at issue there from "searches in the criminal context," such as those at issue here. *Id.*

Moreover, as noted by Respondents themselves, *see* Opp. Br. at 26, the search in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), did not fall within normal Fourth Amendment requirements because criminal prosecution was a "contingency [] certainly of secondary importance" to the social worker's visual inspection of the child's body. *Id.* at 902. Such is certainly not the case here, where Respondents have clearly stated that the threat of criminal prosecution was the "new third step [that]

II. This Case Presents No "Alternate Independent Grounds" for Denying the Petition for a Writ of Certiorari.

First, Respondents' contention that Petitioners consented to the drug tests is simply wrong. As the district court explained, "In order to consent to something, you must have knowledge of what that something is. And that means you must have knowledge of the scope of the search. . . ." Tr. of Further Charge to Jury at 16 (Supplemental Appendix ("SA") at 2). As the Petition outlines in more detail, *see* Pet. at 6-7, none of the evidence proffered by Respondents to establish consent, namely, Joint Exhibit 10 ("To Our Patients" letter),[5] the patient videotape, the hospital consent to medical treatment forms,[6] the public service announcement, and the solicitor's letters, put the Petitioners on notice that their medical providers at MUSC were searching their urine for drugs for law enforcement purposes. Thus, as the dissent below noted, the evidence presented at trial was insufficient to sustain the jury's verdict where it was "not sufficient to establish the plaintiffs' voluntary and knowing consent to the possible use against them in a criminal case of drug test results taken in the course of their pregnancy and labor." *Ferguson v. City of Charleston*, 186 F.3d 469, 488-89 (4th Cir. 1999) (Blake, J., dissenting) (App. 31); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 248 (1973) (consent, to be valid, must be given "freely and voluntarily" and without evidence of coercion, express or implied).

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proved to [be] the pivotal factor in making this an effective policy." Opp. Br. at 7. Thus, *Darryl H.*'s holding involving criminal prosecutions of "secondary importance" has no application to the facts of this case.

[5] The evidence contradicts Respondents' claim that "all patients were given a letter at the time of their initial visit which explained the urine drug testing policy." Opp. Br. at 27; *see* Pet. at 6-7.

[6] Like the court in *United States v. Attson*, 900 F. 2d 1427, 1431 (9th Cir. 1990) (consent forms established consent to medical treatment, not to a search for law enforcement purposes), the district court correctly found that the "written consent is not sufficient to make the searches constitutional" because they were "not broad enough to cover the search as performed because the consent gave only the doctors the right to [test the urine] and use it for their purposes, and it did not refer to the giving of the results of that urine screen to the police to use for their purposes." Tr. of Further Charge to the Jury at 16 (SA at 2).

Second, Respondents' contention that MUSC employees are not state actors is contradicted by well-established precedent of this Court. A warrantless search made by non-law enforcement government officials, such as the MUSC Respondents in this case, for criminal or investigatory purposes is subject to Fourth Amendment protections. *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (when a non-law enforcement government official conducts a search, "there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment."); *see also United Teachers of New Orleans v. New Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998) (public school officials are public employees and state actors regardless of whether they are engaged in law enforcement activity). Even the court of appeals accepted that MUSC employees are governmental actors, reasoning that "when a state hospital develops a general policy to test the urine of certain patients suspected of drug use, the testing constitutes a search within the meaning of the Fourth Amendment." *Ferguson*, 186 F.3d at 477 n.6 (App. 10).

United States v. Attson, 900 F. 2d 1427, 1433 (9th Cir. 1990), is not to the contrary. In that case, the court held that the actions of a physician at a public hospital were not covered by the Fourth Amendment because he "did not intend to elicit a benefit for the government in its investigative or administrative capacity." *Id.* at 1433. In contrast, in this case, the searches were conducted as part and parcel of an interagency plan to report pregnant women who tested positive for cocaine to the police and prosecutors. The tests were clearly intended to "benefit the government in its investigative (or administrative) capacity." *Id.* at 1432. Moreover, in contrast to this case, the doctor in *Attson* refused to turn the test results over to the police. *Attson*, 900 F.2d at 1433.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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Excerpt of Transcript of Further Charge to the Jury (1/6/97)
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. . . IN ORDER TO CONSENT TO SOMETHING, YOU MUST HAVE KNOWLEDGE OF WHAT THAT SOMETHING IS. AND THAT MEANS YOU MUST HAVE KNOWLEDGE OF THE SCOPE OF THE SEARCH. IT IS WITHIN THAT CONTEXT THAT I SAID THAT THE CONSENT MUST BE BROAD ENOUGH TO INCLUDE THE PARAMETERS OF THE SEARCH. IT IS WITHIN THAT CONTEXT THAT I SAID THAT THE WRITTEN CONSENT PERMITTING THE DEFENDANTS OR SOME OF THEM TO DRAW URINE FOR MEDICAL PURPOSES DOES NOT CONSTITUTE CONSENT TO USE THAT URINE FOR POLICE PURPOSES. THE CONSENT FORM AS WRITTEN IS NOT BROAD ENOUGH TO COVER THE SEARCH AS PERFORMED BECAUSE THE CONSENT GAVE ONLY THE DOCTORS THE RIGHT TO DRAW IT AND USE IT FOR THEIR PURPOSES, AND IT DID NOT REFER TO THE GIVING OF THE RESULTS OF THAT URINE SCREEN TO THE POLICE TO USE FOR THEIR PURPOSES.

SO THE WRITTEN CONSENT IS NOT SUFFICIENT TO MAKE THE SEARCHES CONSTITUTIONAL. THER MUST BE SOMETHING MORE. SOMETHING MORE TO SHOW THAT THE DEFNEDANTS – THE PLAINTIFFS CONSENTED NOT ONLY TO THE URINE BEING TAKEN FOR MEDICAL PURPOSES, BUT THAT THEY CONSENTED TO IT BEING ALSO USED FOR POLICE PURPOSES. . . .